No. 3040

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT

THE R. R. THOMPSON ESTATE COMPANY, a Corporation,

Plaintiff in Error,

vs.

LOUISE WEINHARD and ANNA WESSINGER, PAUL WESSINGER and HENRY WAGNER, Executrices and Executors, respectively, of the Last Will and Testament of Henry Weinhard, Deceased,

Defendants in Error.

In Error to the District Court of the United States for the District of Oregon.

Brief on Behalf of Plaintiff in Error

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Names and Addresses of Attorneys upon this Writ of Error.

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STATEMENT:

The plaintiff in error, the R. R. Thompson Estate Co., is a corporation domiciled in California, and the defendants in error are the executrices and executors of the last will and testament of Henry Weinhard, deceased, residing in Oregon. For convenience in this

statement the parties will be referred to as the Thompson Estate and the Weinhard Estate.

In 1912 and 1913 the Thompson Estate was the owner of a block of ground in Portland, Oregon, lying between Third and Fourth, and Oak and Pine Streets, improved with a nine-story hotel building, and the Weinhard Estate was engaged in conducting a brewery in the same city.

I. Gevurtz & Sons, an Oregon corporation, was engaged in the selling of furniture at both wholesale and retail, and as an incident to its business dealt largely, as owner and lessee, in hotel properties; its general scheme being to buy or lease a hotel building, furnish the same from its stock of merchandise, and sell the same as soon thereafter as a purchaser, willing to pay such sum as would net a profit on the transaction, could be found. In pursuance of this plan I. Gevurtz & Sons leased from the Thompson Estate the hotel building on its property, commonly known as "The Multnomah," and immediately thereafter organized the Multnomah Hotel Co., an Oregon corporation, and subscribed for the major portion of its capital stock, and in payment therefor sold and transferred the lease, and the furniture and fixtures theretofore installed in The Multnomah, to the new company, which company proceeded to engage in the general hotel business. Both I. Gevurtz & Sons and the Multnomah Hotel Co. became involved in financial difficulties in 1912, and I. Gevurtz & Sons found it impossible to sell The Multnomah in accordance with its previous methods of doing business.

On January 10, 1913, I. Gevurtz & Sons, for the expressed consideration of One Dollar, gave an option in writing to the Thompson Estate, by the terms of which it agreed to sell to the Thompson Estate, providing said option was exercised, all the common and preferred capital stock of the Multnomah Hotel Co., for the sum of $175,000.00, the same to be paid in cash upon delivery of the stock. The option further provided that the Thompson Estate should have the right in paying said consideration, to apply the same toward the payment of the indebtedness of said Multnomah Hotel to the First National Bank of Portland, Oregon, and to all of the other creditors of said company, to the extent of said sum of $175,000.00, and that all other liabilities or indebtedness of said Multnomah Hotel Co. up to the date of the transfer of said capital stock *should be paid, satisfied and discharged by I. Gevurtz & Sons;* and further, that in the event I. Gevurtz & Sons were not in position to pay such additional debts as they became due, The Thompson Estate would loan to I. Gevurtz & Sons the necessary money wherewith to pay such debts in excess of $175,000.00, provided that I. Gevurtz & Sons would execute its note to the Thompson Estate, payable six months from January 1, 1913, carrying 6 per cent interest, and provided further, that such sum so to be loaned should not exceed $35,000.00.

The option further expressly provided that I. Gevurtz & Sons should warrant and guarantee the said Thompson Estate against any and all indebtedness and liabilities of said Multnomah Hotel Co. over and above the aggregate amounts of $175,000.00, the considera-

tion for the sale of the capital stock, and the $35,000 to be loaned as aforesaid; and should indemnify the Thompson Estate against all claims, demands, actions, damages, liabilities, suits, fines, liens, contracts, etc., of any character whatsoever, either due I. Gevurtz & Sons or any other person, firm or corporation. And the parties expressly further stated in said option as follows (page 97 Transcript): "It being the intention that in selling all of the common and preferred stock of the corporation to said The R. R. Thompson Estate Co. for the sum of $175,000.00, as aforesaid, the said Thompson Estate Co. shall thereby obtain good title to all of the property and assets of said Multnomah Hotel Co., free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness shall be assumed and be paid by said I. Gevurtz & Sons, and the advance by the R. R. Thompson Estate Co. of the additional sum of $35,000 shall only be as a matter of accommodation to I. Gevurtz & Sons, and *shall not be any acknowledgment of any assumption by the said Thompson Estate Co. of any further liabilities or for the payment of any greater sum for the assets of the Multnomah Hotel Co. than represented by the purchase price of the common and preferred stock.*" (Italics ours.)

At the time this option was given a hurried examination of the books of the Multnomah Hotel Co. lead to the conclusion that $35,000.00, together with $175,000.00, the purchase price of the stock, would pay all of the creditors of the Multnomah Hotel Co.

The Thompson Estate exercised its option to purchase, and the capital stock of the Multnomah Hotel Co. was delivered to it by I. Gevurtz & Sons, and the Thompson Estate Co. actually paid the creditors of the Multnomah Hotel Co., including the First National Bank, which claim alone amounted to $143,000.00, the full purchase price of $175,000.00, and also disbursed, by arrangement with I. Gevurtz & Sons, to the creditors of the Multnomah Hotel Co., $35,000.00, and took the note of I. Gevurtz & Sons in payment thereof, as had been previously agreed upon.

At the time of these payments and the delivery of the capital stock, I. Gevurtz & Sons also made, executed and delivered to the Thompson Estate Co. its guaranty in writing to the effect that it would guarantee and indemnify the Thompson Estate against any and all further claims, liabilities, etc., of the said Multnomah Hotel Co.

After the Thompson Estate had completed a thorough examination of the Multnomah Hotel Co. books it was discovered that in addition to the creditors paid to the extent of $210,000.00 advanced by the Thompson Estate Co. there remained unpaid creditors having claims against the Multnomah Hotel Co., aggregating in round numbers $24,000.00, and relying upon the written guaranty of I. Gevurtz & Sons, and believing itself protected thereby, the Thompson Estate paid from time to time the claims of creditors as they were presented until I. Gevurtz & Sons were adjudged bankrupt by the United States District Court for Oregon, and the Thompson Estate Co. discovered that the guaranty it

had relied upon in making the payments as aforesaid, was no more than "a mere scrap of paper."

At this time there remained unpaid the claim of Weinhard Estate, consisting of two notes for $4,500.00 and $1,500.00 respectively, besides another claim due the National Cash Register.

On May 29, 1913, the Thompson Estate filed its claim against the bankrupt estate of I. Gevurtz & Sons, setting forth therein by way of attached exhibits, the option, the note, the guaranty, copies of minutes of directors' meetings of I. Gevurtz & Sons, and full statements of accounts paid under the arrangement by it, and also those claims remaining unpaid, which latter claims included the Weinhard Estate's claim, thereby exhibiting to the referee in bankruptcy the entire history of the transaction between I. Gevurtz & Sons and itself, and the basis of its claim. Subsequently the claim was amended and was finally allowed by the referee, and dividends thereon to the extent of 23 per cent have been paid to the Thompson Estate.

On April 15, 1916, three years later, the Weinhard Estate made demand on the Thompson Estate for payment of $3,500.00 and interest, the balance alleged to be due it on account of a note for $4,500.00, dated at Portland, Oregon, March 6, 1912, and signed by the Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, which demand was refused by the Thompson Estate, and this litigation is the result of such refusal.

The complaint contains a statement of two alleged causes of action, by the first of which it is charged, after

setting forth the status of the parties, the giving of the $4,500.00 note, signed by Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, the option given Thompson Estate by I. Gevurtz & Sons, etc. (paragraph VIII, page 11 of the Transcript), that the Thompson Estate Co. exercised its option to assume and agreed to pay and assumed all the debts of the Multnomah Hotel Co. owing at the time of said purchase of said capital stock, in excess of $175,000.00, and that the R. R. Thompson Estate Co. assumed the debts of said Multnomah Hotel Co. owing the plaintiffs herein, and (paragraph IX, page 12 of the transcript) that the R. R. Thompson Estate Co. in the proceedings in bankruptcy of I. Gevurtz & Sons, admitted its assumption of all the debts of said Multnomah Hotel Co. and filed its claim against said estate for the amount of debts of said Multnomah Hotel Co. assumed or paid by it in excess of $175,000.00, and concludes, in paragraph XI, that by reason of the premises the Thompson Estate became indebted to the Weinhard Estate for the balance due on the note here sued on. By the second cause of action the same facts are pleaded with this difference: that it is claimed that the debts of the Multnomah Hotel Co., including the Weinhard Estate claim, did not amount to $175,000.00, by reason of which premises the Thompson Estate Co. should pay the claim. The answer, in so far as is relied upon by the Thompson Estate, consisted of a general denial, and put the plaintiff to its proof.

At the trial which was had by the court, both parties having waived a jury in writing, there was introduced

in evidence, over plaintiff in error's objection, in the order herein stated:

EXHIBIT "A"—

Note from the Multnomah Hotel Co., Philip Gevurtz and I Gevurtz & Sons to the defendant in error (Transcript, p. 68).

EXHIBITS "B" and "C"—

Two checks showing payment by the Weinhard Estate to the Multnomah Hotel Co. of $2,000.00 and $2,500.00 respectively (Transcript, p. 71).

EXHIBIT "D"—

Claim of the Thompson Estate Co. in the bankruptcy matter of I. Gevurtz & Sons (Transcript, p. 77).

EXHIBIT "E" —

Amended claim of the Thompson Estate Co., in the bankruptcy matter of I. Gevurtz & Sons (Transcript, p. 81).

Attached to Exhibit "D" and by reference made a part of Exhibit "E" are certain documents: (a) Statement of account between I. Gevurtz & Sons and the Thompson Estate Co., 89 Transcript; (b) Statement of accounts paid by the Thompson Estate Co., 92-3 and 4, Transcript; (c) Statement of accounts unpaid by the Thompson Estate Co., 95 of Transcript; (d) The option, page 95 Transcript; (e) the note for $35,000.00 from I. Gevurtz & Sons to the Thompson Estate, page 99, Transcript; (f) the guaranty from I. Gevurtz & Sons to Thompson Estate Co., page 100 Transcript; (g) Copy of the minutes of the board of directors of

I. Gevurtz & Sons, authorizing the sale of the capital stock, and the execution of the note and guaranty by I. Gevurtz & Sons:

EXHIBIT "F"—

Stipulation between the attorneys for trustee in bankruptcy, and the Thompson Estate Co. (Transcript, p. 114).

EXHIBIT "G"—

Memorandum of authorities submitted by the Thompson Estate Co. attorneys, to the referee in bankruptcy, in the matter of I. Gevurtz & Sons, bankrupts (Transcript, p. 116).

EXHIBIT "H"—

The order of the referee in bankruptcy allowing the claim (Transcript, p. 127).

EXHIBITS "I" and "J"—

Dividend sheets of I. Gevurtz & Sons in bankruptcy (Transcript, p. 130).

EXHIBIT "K"—

Schedules in bankruptcy of Multnomah Hotel Co., (Transcript, p. 132).

The foregoing together with the admission by counsel that the books of the Multnomah Hotel Co. contained a certain statement concerning the claims sued on, (page 133 of the Transcript) makes up the entire evidence submitted to the District Court.

After the trial the court filed its opinion and a general finding for the defendants in error (38 of Transcript), upon which judgment was entered for the de-

fendant in error May 21, 1917, page 38 of Transcript. On June 8, 1917, plaintiff in error filed its motion to vacate the judgment and to set aside the findings, and for a new trial (39 of Transcript), and on June 11, 1917, the District Court entered an order granting said motion for the purpose of allowing plaintiffs in error to present to the court proposed special findings of fact and conclusions of law, and the court considered the said findings and conclusions proposed by the plaintiff in error, and on June 11, 1917, declined and refused to make, sign or file either of the same; whereupon the plaintiff in error requested the court to make, sign and file special findings of fact and conclusions of law in accordance with the court's general finding theretofore vacated, which the court in its discretion refused to do, to all of which actions on the part of the court the plaintiff in error duly excepted, and its exceptions were allowed (see pages 49, 50 and 51 of Transcript). Whereupon the court having again filed its general finding and judgment, plaintiff in error prosecutes this writ of error.

By stipulation between the parties the bill of exceptions contains all of the evidence and proceedings had in the trial court, and it is stipulated that the same shall stand as a statement of facts in this court.

SPECIFICATIONS OF ERROR.

In the proceedings before the honorable District Court there was error in this:

First. In the holding by the court that the complaint stated facts sufficient to constitute a cause of action.

Second. In the holding by the court that the evidence introduced and received was admissible under Section 808, Lord's Oregon Laws (Subdivision 2).

Third. In the holding by the court that the evidence introduced and received proved or tended to prove the material allegations of the complaint.

Fourth. In the refusal of the court to make, sign and file the special findings of fact proposed by the plaintiff in error.

Fifth. In the refusal of the court to make, sign and file the conclusions of law proposed by the plaintiff in error.

Sixth. In the refusal of the court to make, sign and file special findings of fact and conclusions of law to support its judgment, and

Seventh. In the holding by the trial court that there was sufficient evidence to support the complaint, or a judgment for the defendant in error.

ARGUMENT.

In argument we will present the case by considering:

First: The first specification of error;

Secondly: The second specification of error; and

Lastly: The third, fourth, fifth, sixth and seventh specifications of error.

The complaint does not state a cause of action.

It appears from the complaint that the agreed consideration to be paid by plaintiff in error to I. Gevurtz & Sons was $175,000.00. It further appears from the complaint that the plaintiff in error actually paid, or assumed debts in excess of said sum. Such agreement was void as to the excess of $175,000.00, for two reasons, namely, for want of consideration, and because the undertaking to assume debts in excess of $175,000.00 was void, because no memorandum of the same was signed by the plaintiff in error, the party to be charged.

Secondly. In support of the second specification of error we respectfully insist that none of the evidence introduced was competent.

Our State, in common with others, has adopted the statute providing that agreements to answer for the debt, default, or miscarriage of another, shall be void unless some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or his lawfully authorized agent, and that "evidence therefore of the agreement shall not be received, other than the writing or secondary evidence of its contents in the cases prescribed by law."

Lord's Oregon Laws, Sec. 808, Subdivision 2.

All the cases hold that there is an exception to the rule that the agreement must be in writing, where, because of the relation between the parties it can be said that the promise to pay a third party's debt is in effect

a promise to pay the promisor's own debt. The author of the article on the Statute of Frauds in Cyc., states the rule as follows: "It is of importance to determine in each case of an undertaking which in form purports to be the promise to pay the debt of another, whether it is such in fact, for it is well settled that if an oral agreement is in effect a promise to pay the debt of the promisor himself, it is not within the statute of frauds, although the incidental result of its performance may be the discharge of the indebtedness of another person * * *. Or where the promisor, being the vendee of property, orally agrees to pay a debt of the vendor, in payment of the price of the property bought." Citing *Champlain Construction Co. vs. O'Bryan,* 117 Fed. 271. "But the principle will not be construed to extend to an oral promise to pay an amount in excess of that for which the promisor is legally liable." 20 Cyc., 167, citing *Hill vs. Daugherty,* 33 N. C. 195.

All the evidence offered by the defendant in error in this case established or tended to establish conclusively that the plaintiff in error had actually disbursed in cash an amount in excess of $210,000.00, whereas the agreement to purchase fixed the consideration for the capital stock sold at $175,000.00.

In the case of *Kiernan vs. Kratz,* 42 Ore. 477, the Supreme Court of Oregon, on this question said, page 478: "A well recognized exception to this rule exists, however, where a debtor assigns funds or securities, or transfers property to another, who in consideration of the receipt thereof, orally promises to pay the debtor's obligations to a third person, in which case the

latter may maintain an action on such agreement though not a party thereto. The reason for this deviation from the expressed provision of the statute is based upon the assumption that the oral promise attaches to the obligation growing out of the receipt of the fund, security, or property, rendering the agreement enforceable for the benefit of the person for whose benefit it is made." Page 480, quoting Justice Grover of the Supreme Court of New York: " 'The language shows that the test to be applied to every case is whether the party sought to be charged is the principal debtor, primarily liable, or whether he is only liable in case of the default of the third person,' and it was held that to take the case out of the statute there must be a consideration moving to the promisor either from the creditor or the debtor, and beneficial to him, thus imparting to the promise the character of an original undertaking."

Page 482, quoting *Fullam vs. Adams,* 37 Vt. 391: " 'If the real substance of the promise be to perform some duty or obligation of the party making the promise, it is not within the statute, though in form it is a promise to pay another's debt, and the result of its performance may affect the payment of the debt of another. And we believe it will be found that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debts of another is binding, the promisor held in his hands funds, securities, or property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of such fund.' "

So it will be seen from an examination of the au-

thorities and the opinions of text-writers who have discussed this proposition, that in no case has it been said that evidence may be introduced of the oral promise to pay another's debt, unless it be first shown that the promisor has in his hands some fund, property or thing for which he is obliged to account, and which thus places him in the legal position of paying his own debt rather than the debt of another. In the case at bar it was a prerequisite to the introduction of any testimony showing or tending to show an assumption or promise on the part of the plaintiff in error to pay the defendant in error's claim, to show: either that there was a fund in the hands of the plaintiff in error out of which the defendant in error's claim might be satisfied, or some other reason to take the case out of the general rule. And in the absence of such showing the evidence that was admitted and received over the plaintiff in error's objection was inadmissible.

We come now to the propositions covered by the third, fourth, fifth, sixth and seventh assignments of error, and contend that none of the evidence introduced and received proved or tended to prove the material allegations of the complaint, but on the contrary, the evidence, which consisted principally of writings, established the findings of fact proposed by the plaintiff in error, upon which the the plaintiff in error was entitled to have the court make the conclusions of law proposed by it. The court not only refused to make the special findings and conclusions proposed by the plaintiff in error, but refused to make any special findings of fact or conclusions of law, and from a consideration

of the entire evidence it will appear that there was nothing offered upon which can be predicated a judgment for the defendant in error. The entire issues before the trial court and to be decided in this court may be summed up in the following query:

WILL W, BEING THE CREDITOR OF G AND M, CORPORATIONS, BE PERMITTED TO MAINTAIN AN ACTION IN HIS OWN NAME AGAINST T, THE PURCHASER OF G'S STOCK IN M, UPON THE THEORY THAT T PROMISED G TO PAY M'S DEBT, WHEN IT IS SHOWN THAT T HAS ALREADY PAID THE FULL PURCHASE PRICE TO M'S CREDITORS?

We answer this query, No, for two reasons: First, the full purchase price having been paid, there was no consideration for the promise, if given, for from the earliest cases the only reason given for permitting the creditor of one person to sue in his own name upon a promise made for his benefit to his debtor by the purchaser of that debtor's assets, was, that his debtor having given a good and valuable consideration for such a promise, the purchaser was charged with a duty in the nature of a trust, to distribute the funds in his hands in accordance with his promise to the seller, and that the creditor having an interest in that fund, was entitled to sue in his own name, without showing any new consideration for that promise. But we have found no case wherein it has been held that the creditor could compel the payment of anything more than the purchase price.

National Bank vs. Grand Lodge, 98 U. S. 123 (25 Law Ed. 74).

Anderson vs. Fitzgerald, 21 Fed. 295.

Sayword vs. Dexter Horton & Co., 72 Fed. 765.

American Exchange Bank vs. N. P. Railway Co., 76 Fed. 130.

Pennsylvania Steel Co. vs. N. Y. City Railway Co., 198 Fed. 749.

Dewing vs. Leavitt, 85 N. Y. 30.

First Nat. Bank of Sing Sing vs. Chalmers, 39 Hun. 475.

Jefferson vs. Asch, 53 Minn. 447.

McArthur vs. Dryden, 6 N. D. 438.

Hargadine vs. Swoffert, 65 Kans. 575.

Ellis vs. Harrison, 104 Mo. 270.

Rathel vs. Smith, 68 Mo. 258.

Bank vs. Chick, 170 Mo. App. 347.

Adams vs. Quehn, 119 Pa. St. 85.

Davis vs. Dunn, 121 Mo. App. 493.

9 Cyc., 374, 376, 377, 380, 382, 386.

Linneman vs. Moross, 39 Am. St. Rep. 531 and note therein.

Parker vs. Jeffery, 26 Ore. 189-190.

Washburn vs. The Investment Co., 26 Ore. 441.

Brower Lumber Co. vs. Miller, 28 Ore. 569, 570 and 571.

Feldman vs. McGuire, 34 Ore. 312, 13.

Such a promise as was given in this case, if we assume the most favorable construction that can be placed upon the situation for the defendant in error, was void under the statute of frauds, as it was not the promise to answer for the debt of the plaintiff in error but for the debt of the Multnomah Hotel Co.

Lord's Oregon Laws, Sec. 808 supra.

Feldman vs. McGuire, supra.

It is charged by the complaint that the plaintiff in error assumed and agreed to pay the defendant in error's demand. In order to establish this proposition the defendant in error introduced in evidence: First, the promissory note payable to itself, signed by Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, together with two checks evidencing the payment by the defendant in error to Multnomah Hotel Co., of the sum represented by that note; next was introduced in evidence, proof of claim, of the plaintiff in error against the bankrupt estate of I. Gevurtz & Sons, wherein it is stated (page 83 of the Transcript) that the lists attached to said proof of claim, marked A, B, C, D, E and F, was a detailed statement of all claims, liabilities and demands due and owing from the Multnomah Hotel Co. *and assumed and agreed to be paid by said bankrupt;* and Exhibit D there referred to (which is set forth on pages 92-3-4 and 5 of the Transcript) shows the account of Henry Weinhard Estate to consist of two notes for $1500.00 and $4500.00, respectively; so that the proof of claim in bankruptcy, if it established anything,

established not the assumption of defendant in error's claim by the plaintiff in error, but established the fact that the plaintiff in error did not assume or agree to pay it. Attached to said proof of claim and marked Exhibit G, was the option given by I. Gevurtz & Sons to the plaintiff in error, which contains this statement (Transcript, page 97): "It being the intention that in selling all of the common and preferred stock of the corporation to said The R. R. Thompson Estate Co. for the sum of $175,000.00, as aforesaid, the said Thompson Estate Co. shall thereby obtain good title to all the property and assets of said Multnomah Hotel Co. free and clear of all claims, demands, liabilities, liens or indebtedness of any character or nature whatsoever, and that any and all other such debts, liabilities, liens or indebtedness shall be assumed and paid by said I. Gevurtz & Sons, and the advance by the R. R. Thompson Estate Co. of the additional sum of $35,000.00, shall only be as a matter of accommodation to I. Gevurtz & Sons, *and shall not be any acknowledgment of any assumption by said Thompson Estate Co. of any further liabilities, or for the payment of any greater sum for the assets of the Multnomah Hotel Co. than represented by the purchase price of the common and preferred stock.*" The very proof of claim to which this exhibit was attached showed that the Thompson Estate Co. had, in addition to paying $175,000.00, the purchase price of the stock, and $35,000.00, the amount of the loan, to I. Gevurtz & Sons, advanced in addition and actually paid to creditors of the Multnomah Hotel Co. some $20,000.00, and this proof, which certainly

binds the defendant in error, as it was introduced by it over plaintiff in error's objection, not only fails to prove the allegations of the complaint, but absolutely DISPROVES the theory that the plaintiff in error assumed the obligation, which is the basis of the first cause of action in the complaint stated, and disproves as well the theory of the second cause of action which was in effect that the debts of the Multnomah Hotel Co. did not exceed $175,000.00. All the evidence introduced was of like character.

In *National Bank vs. Grand Lodge,* 98 U. S. 123, the Supreme Court of the United States rendered what may probably be correctly termed the leading case in the Federal courts on the general proposition. In that case certain bondholders sued the Grand Lodge of A. F. & A. M. upon a resolution by which the Grand Lodge agreed to assume payment of $200,000.00 of bonds issued by the Masonic Hall Association, provided stock be issued to the Grand Lodge by said Association to the amount of the assumption of payment by the Grand Lodge. Mr. Justice Strong, in delivering the opinion of the court, said: "We do not propose to enter at large upon a consideration of the inquiry how far privity of contract between a plaintiff and defendant is necessary to the maintenance of an action of assumpsit. The subject has been much debated, and the decisions are not all reconcilable. No doubt the general rule is that such a privity must exist. But there are confessedly many exceptions to it. One of them, and by far the most frequent one, is the case where, under a contract between two persons, assets have come to the promisor's hands

or under his control, which in equity belong to a third person. In such a case it is held that the third person may sue in his own name. But then the suit is founded rather on the implied undertaking the law raises *from the possession of the assets, than on the express promise.* (Italics our.) * * * Even as between the Association and the Grand Lodge, the latter was not bound to pay anything, except so far as stock of the former was delivered or tendered to it. The promise to pay and the promise to deliver the stock were not independent of each other. They were concurrent and dependent. Of this there can be no doubt. * * * Certainly the obligation of the Lodge was made contingent upon the issue of the stock, and the consideration for payment of the debt to the bondholders was the receipt of the stock. But the bondholders can neither deliver it nor tender it; nor can they compel the Hall Association to deliver it. If they can sue upon the contract and enforce payment by the Grand Lodge of the bonds, the contract is wholly changed, and the Lodge is compelled to pay, whether it gets the stock or not. To this it cannot be presumed the Lodge would ever have agreed. It is manifest, therefore, that the bondholders of the Hall Association are not in such privity with the Lodge and have no such interest in the contract, as to warrant their bringing suit in their own names."

In *Pennsylvania Steel Co. vs. N. Y. City Railway Co.*, 198 Fed. 749, *supra*, the court said: "It is generally held, subject to qualifications, that a third person may sue upon a promise made to another for his benefit. Sometimes the right is based by the courts upon

provisions in codes giving the 'real party in interest' the right to prosecute suits. Sometimes it is based upon the theory of a trust; the promisor being regarded as trustee for the third party. Sometimes it is based upon the theory of agency; the promisee in the contract being considered the agent of the third party, who adopts his acts in suing upon the contract. But whatever may be the correct theory, one thing is essential to the right and that is that the third person be the real promisee. It is not enough that the contract may operate to his benefit. It must appear that the parties intend to recognize him as the primary party in interest and as privy to the promise."

The only consideration which the plaintiff in error at any time ever received for its alleged promise to pay these debts (which by the way it did not make) was the transfer to it by I. Gevurtz & Sons of the capital stock of the Multnomah Hotel Co. agreed to be worth only $175,000.00; and having paid out, as the evidence conclusively shows, in actual money a sum in excess of $210,000.00, it neither has any funds or assets in its possession with which to pay creditors of the Multnomah Hotel Co., nor could *I Gevurtz & Sons* in a direct action compel it to pay any greater sum for that capital stock than was provided for by the terms of the agreement between the parties.

The author of the article in 9 Cyc., page 380, states the rule as follows: "By the weight of authorities the action cannot be maintained merely because the third party will be incidentally benefited by performance of the contract; but he must be a party to the consideration,

or the contract must have been entered into for his benefit, and he must have some legal or equitable interest in its performance." Page 386: "To a suit by a third person upon a contract made for his benefit, a failure of consideration or a rescission of the contract by the parties thereto, before the acceptance by the plaintiff of the stipulation in his favor, is a defense."

In the note to *Linneman vs. Moross,* 39 Am. St. Rep. 531, will be found decisions from practically every state in the Union, as well as the Federal courts, on this proposition. We have read a great many of them and have been unable to find a single case holding that where the consideration fails, or where the purchaser from the original debtor has paid the full purchase price, he can be held for the debt. We have found one case expressly holding with our contention in the case at bar. In the case of *Davis vs. Dunn,* 121 Mo. App. 493, it was admitted that the buyer of a stock of merchandise had agreed to pay 80 per cent of the value of the said stock, and out of the purchase price to pay items of indebtedness due from the tenant (the seller), including a claim for rent; and it was held that when the buyer had paid debts of the tenant to the amount of more than the value of the goods without paying the rent, he was not liable for the rent claimed, although it was found that the promise of the buyer for the benefit of the landlord was an unconditional promise.

In the case of *Dewing vs. Leavitt,* 85 N. Y. 30, the writer of the opinion says: "I know of no authority to support the proposition that a person not a party to the promise, but for whose benefit the promise is made, can

maintain an action to enforce the promise where the promise is void as between the promisor and promisee for fraud, *or want of consideration,* or failure of consideration." It will certainly not be contended in the case at bar that I. Gevurtz & Sons could have compelled performance of this promise—if there was a promise—for the reason that the plaintiff in error had a perfect defense to any claim by I. Gevurtz & Sons, namely, *failure of consideration.*

In the case of *First Bank of Sing Sing vs. Chalmers,* 39 Hun, 475, the defendant had taken over from his debtor a stock of merchandise in payment of his account, and had promised to pay certain claims owed by his debtor to third parties, including the plaintiff. In that case the court said: "In the beaten way of justice there is no reason why these defendants should pay these claims. On the contrary it would be inequitable and unjust to oblige them to do so. Neither the plaintiff nor Spruce & Leary (the sellers) have parted with anything or surrendered any right."

In the case of *Jefferson vs. Asch,* 53 Minn. 447, the court after fully reviewing the New York and Massachusetts cases, says: "In every case but one, the promise was to pay a debt of the promisee, and a fund was either left or put in the hands of the promisor for the purpose," and the one exception noted was in the case of a mortgage.

Again it is held by many authorities that the right of a third party to sue is limited by the rights of the original debtor. In *Hargadine vs. Swoffert,* 65 Kan. 575, the court said: "What Kraemer could do or could not

do in an action by him against Hargadine is the test of what Swoffert can do or cannot do, because Swoffert must claim under the same contract that Hargadine would have been compelled to claim under had he brought the action."

And in *Ellis vs. Harrison,* 104 Mo. 270, the court said: "Whatever right of action a third party to such an engagement may acquire by virtue of its terms against either of the directly contracting parties, it is clear on principle that such a right cannot be broader than the party to the contract through whom the right of action is derived would have in event of its breach. To state this in another form, the right of action by an outside beneficiary for whose advantage a contract is made between two other persons, is entirely subordinate to the terms of that contract as made. Such beneficiary cannot acquire a better standing to enforce the agreement than that occupied by the contracting parties themselves."

The rule for which we are contending has been held to apply even to cases where the party suing had a specific lien on the assets. In the case of *Raethel vs. Smith,* 68 Mo. 258, the defendant purchased a certain lot of bricks which it was believed would be sufficient to enable him to pay off two mortgages against the same. He paid a certain portion to the seller, at which time it was discovered that there were not sufficient bricks under the contract price to pay both mortgages. He paid the first mortgage, and it was held in an action brought by the second mortgagee to compel satisfaction of his claim from the transaction, that the pur-

chaser, having in good faith responded to the extent of the fund in his hands, was not liable on his promise to pay the debt.

In the case of *McArthur vs. Dryden,* 6. N. D. 438, the court held that even where the State statute provided for an action by a third party on a contract made for his benefit, "the statute presupposes a valid contract between the parties that rests upon *a sufficient consideration.*" (Italics ours.)

These and other cases, are cited with approval in *Anderson vs. Fitzgerald,* 21 Fed. 295, which adopts the reasoning in *National Bank vs. Grand Lodge,* 98 U. S. 123, and in *Sayword vs. Dexter Horton & Co.,* 72 Fed. 765 decided by this court. And from all of these cases it will be seen that the only reason for holding that the contract can be enforced is, first, that the defendant has in his hands some fund out of the proceeds of which he has agreed to pay the third party, and that this promise thus becomes his own promise, and is therefore not within the statute of frauds.

In the case of *Parker vs. Jeffery,* 26 Ore., page 189, Justice Bean, writing for the court said: "The doctrine, however, is not applicable to every contract made by one person with another, from the performance of which a third person will derive a benefit, but is limited to contracts which have for their primary object and purpose the benefit of a third person, and which were made for his direct benefit. 'To entitle him to an action,' says Mr. Justice Rapallo, 'the contract must have been made for his benefit. He must be the party intended to be benefited,'" citing with other cases *Na-*

tional Bank vs. Grand Lodge; and the Justice concludes: "From these and other authorities which might be cited we take the rule to be that to entitle a third person to recover upon a contract made by others, there must not only be an intent to secure some benefit to such third person, but the contract must have been made and entered into directly and primarily for his benefit. * * * But in nearly—if not quite in every case coming under our notice in which the action has been sustained, unless on a bond or obligation authorized by law, there has been some property, fund, debt, or thing in the hands of the promisor upon which the plaintiff had some equitable claim, and from which the law, acting upon the relation of the parties, or the fund, established the privity, implied the promise, and created the duty upon which the action was founded."

Again, in the case of *Washburn vs. The Investment Co.,* 26 Ore. 436, the Supreme Court, through Mr. Justice Bean, had the following to say, page 442: "After a somewhat exhaustive examination of the question, we have found no case which has gone so far as to hold that such action can be maintained on an executory contract by which one person promises to advance his own money to pay the debts of another, but, on the contrary, the authorities deny the application of the rule to such a contract." Citing *Bank vs. Grand Lodge* and other cases * * * page 443: "But where there is no such fund, debt, or obligation in the hands of, or owing from the promisor, but only an executory contract by one person to advance his own money to pay the debts of another, who is a party to neither the contract or con-

sideration, *it is difficult to see upon what principle the doctrine can be applied.*" (Italics ours.) In the case under consideration by the court the contract between the defendant and the original debtor was an agreement that the defendant would advance its own funds for the purpose of paying the debts of the leather company, which advance, when made, should be repaid by a certain amount of the capital stock of the leather company, and the cancellation of a subsidy contract entered into between the parties, and the court said, pages 443-4: "It was, in effect, an agreement by the defendant to advance to the leather company money with which to pay its debts, and take in satisfaction thereof its stock. If such a contract can be enforced by the plaintiff, then every contract by which one person promises or agrees with another, for a consideration moving from him, to advance money to pay his debts, can be enforced by the parties whose debts were thus to be paid. We do not understand any case to have gone to that extent. * * * The creditors may have had, and no doubt did have, an interest in the performance of the contract, as they would have had in the performance of an agreement by which any person should undertake to lend or advance money to the leather company to enable it to pay its debts, but this is a very different thing from the interest necessary to enable them to enforce the contract by actions in their own names."

We have quoted from the last cited case quite freely because of the conviction that a close examination of that case will reveal the fact that in principle the case at

bar is on all fours with it. In that case there was a contract between the parties that the defendant Investment Co. would advance money to pay the leather company's debts, and in consideration thereof the defendant was to receive capital stock of the leather company. It was conceded that the defendant had promised the leather company to assume and pay its debts, which makes it a much stronger case than the case at bar, for the reason that there was no promise by the plaintiff in error to pay the debts of either I. Gevurtz & Sons or the Multnomah Hotel Co. On the contrary the evidence conclusively shows that the plaintiff in error had no intention of being so bound, and certainly the courts will not go to the extent of making an entirely new contract between the parties. But if it be conceded that the plaintiff in error did promise I. Gevurtz & Sons to pay the debts of the Multnomah Hotel Co. inasmuch as it received no consideration for that promise, and the same was executory, and not in writing, there can be no recovery in a suit by one of the Hotel Company's creditors.

In the case of *Brower Lumber Co. vs. Miller,* 28 Ore. 570, the learned District Judge who tried the case at bar, in writing the opinion for the Supreme Court of Oregon, quoting from the opinion of *Jefferson vs. Asch,* 53 Minn. 447, said: "To give a third party who may derive a benefit from the performance of the promise an action, there must be—*first,* an intent by the promisee to secure some benefit to the third party; and, *second,* some privity between the two—the promisee and party to be benefited—and some obligation or duty owing from

the former to the latter, which would give him a legal or equitable claim to the benefit of the promise, or an equivalent from him personally." "There must be either a *new consideration,* or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement; and "there must be some legal right, founded upon some obligation of the promisee, in the third party, to adopt and claim the promise as made for his benefit." The author quotes the opinion of Mr. Justice Bean in *Parker vs. Jeffery,* 26 Ore. and also the *Washburn Case,* 26 Ore., and concludes that there could be no recovery in that case, although the question squarely presented was whether material men could recover upon a provision in the bond of a street contractor to the city, that he, the contractor, would pay all money due and to become due for materials used and labor performed in completing his work, and held that there was no fund or property provided in the hands of the promisor on which they, the laborers, could have any equitable claim.

Again in the case of *Feldman vs. McGuire,* 34 Ore., 309, wherein the learned District Judge, in discussing the same principle, on behalf of the Supreme Court of the State of Oregon, in a case where the question of the statute of frauds was involved, after a holding that the case did not come within the Statute of Frauds (page 313), said: "It is pertinent to add that the question whether the promisor *has received money or property in consideration of the promise has, in general, been regarded as a controlling circumstance or factor in the transaction."* (Italics ours.)

We have proceeded thus far in this argument on the assumption that the plaintiff in error did actually assume the debt due the defendant in error from the Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, and believe we have demonstrated that the defendant in error could not recover on that theory, but let us now with particular reference to the seventh specification of error, consider the evidence introduced with a view of determining how far short the same falls of establishing any such fact in this case. We find that the entire record and the only evidence introduced to support defendant in error's complaint is the writings between I. Gevurtz & Sons and the plaintiff in error, the opinion of the referee in bankruptcy as to the allowance of plaintiff in error's claim against the bankrupt estate of I. Gevurtz & Sons, a stipulation between the attorneys for plaintiff in error and the attorneys for the trustee in bankruptcy of I. Gevurtz & Sons, a memorandum of authorities by the attorneys for plaintiff in error in the bankruptcy proceedings of I. Gevurtz & Sons, and the schedules in bankruptcy of the Multnomah Hotel Co., and we assert with firm conviction that this evidence not only fails to disclose any assumption of the defendant in error's debt, but absolutely negatives such a proposition. The option which ripened into an agreement between I. Gevurtz & Sons and the plaintiff in error constituted the actual contract, its terms are as clear, direct and explicit as the English language could make it. Therein it is set forth that the consideration for the sale of the common and preferred stock of the Multnomah Hotel Co. by

I. Gevurtz & Sons to the plaintiff in error should be $175,000.00; that the plaintiff in error should have the right in paying said sum to apply the same toward the payment of the indebtedness of the Multnomah Hotel Co. to the First National Bank of Portland, and to all other creditors of said company to the extent of said sum of $175,000.00, *and any and all other liabilities or indebtedness of said Multnomah Hotel Co. up to the date of the transfer of stock shall be paid, satisfied and discharged by I. Gevurtz & Sons.* (Italics ours.). The option then provided that in case I. Gevurtz & Sons were unable to meet these additional payments that the plaintiff in error would advance the sum of $35,000 to I. Gevurtz & Sons, taking its note therefor, and further, that the said I. Gevurtz & Sons should indemnify plaintiff in error against all further claims or demands, actions, damages, liabilities, suits, fines, liens, contracts or indebtedness of any character whatsoever, either due to I. Gevurtz & Sons directly or indirectly, or to any other person, firm or corporation, arising out of or incurred in the operation of said Multnomah Hotel from the time of its beginning to the date of delivery of possession of the capital stock. And then to save any question as to whether the plaintiff in error did assume any debts in excess of the purchase price, the parties provided expressly that the advance of the $35,000 "shall not be any acknowledgment of any assumption by said Thompson Estate of any further liability, or for the payment of any greater sum for the assets of the Multnomah Hotel Co. than represented by the purchase price of the common and preferred stock." (Pages 96, 97 and 98 of the Transcript.)

The promissory note given by I. Gevurtz & Sons to plaintiff in error, and introduced in evidence, only confirms the agreement, and proves that the additional sum of $35,000.00 was advanced only as a matter of accommodation to I. Gevurtz & Sons. The guaranty of I. Gevurtz & Sons to Thompson Estate Co. expressly bound I. Gevurtz & Sons to pay any indebtedness or liabilities remaining unpaid or in excess of $210,000.00, the aggregate amount of the purchase price and the loan (page 101, Transcript). The minutes of the meeting of the board of directors of I. Gevurtz & Sons recited the contract and declared that one of the conditions of the sale of the stock was that I. Gevurtz & Sons should pay all liabilities or indebtedness of the said Multnomah Hotel Co. up to the date of the transfer of the stock, and should warrant and guarantee the plaintiff in error against any and all indebtedness and liabilities over and above the aggregate amounts of the purchase price and the loan, and that the loan of $35,000.00 should only be considered as a matter of accommodation and not any acknowledgment of any assumption by the plaintiff in error of any further liability, and that the option should be adopted and become a binding and valid contract. The sworn proof of claim in bankruptcy filed by the plaintiff in error in the matter of the estate of I. Gevurtz & Sons recited by way of exhibit the accounts payable which it is sworn was assumed *and agreed to be paid by the bankrupt I. Gevurtz & Sons,* and showed the account of the defendant in error unpaid (pages 84, 95 of the Transcript). Then there was introduced in evidence over plaintiff in error's objection,

a stipulation that the claim be allowed for $57,560.04, which was some $22,500.00 more than had been agreed to be paid by the Thompson Estate Co., or advanced by it, and the brief of the attorneys for plaintiff in error before the referee, which must certainly be held to bind the defendant in error who introduced it over objection, contains the express statement that the plaintiff in error paid the sum of $175,000.00, and advanced the $35,000 by way of loan.

Then there was introduced in evidence the dividend sheets of I. Gevurtz & Sons in bankruptcy, which showed the allowance of plaintiff in error's claim and payments thereunder, and next was introduced the schedule in bankruptcy of the Multnomah Hotel Co., which showed that the defendant in error was a creditor of that company in the sum of $3,500.00, and that no other person was liable for its payment, and indeed, it is admitted by the testimony of Mr. Wessinger and by the allegations in the defendant in error's complaint, that subsequent to the transactions resulting in this litigation, the defendant in error looked to the Multnomah Hotel Co. for the payment of its debt, and actually collected one note of $1,500.00 in full, and $1,000.00 upon the note here sued on (see paragraph IV of the complaint, page 16 of the Transcript, and the testimony of Mr. Wessinger at page 75 of the Transcript). And to add additional weight to the mass of evidence already introduced disproving defendant in error's contention counsel secured from the writer the admission that under a book entry in the books of the Multnomah Hotel Co., wherein the defendant in error is scheduled as a cred-

itor of that company, somebody, presumably Mr. Yates, who was then the president and general manager of the Multnomah Hotel Co., wrote: "We assume payment of the following notes." It is impossible to determine in advance what counsel will claim for this admission, but it is certain that it cannot be successfully contended that it proves the assumption of this debt by the plaintiff in error.

We cannot conceive of a case where to compel payment of a creditor's claim by the purchaser of the assets of that creditor's debtor, would work a greater hardship than in the instant case. The plaintiff in error purchased certain capital stock for $175,000.00. In good faith it paid all the stock was worth. In order to help out the creditors of the Multnomah Hotel Co. and of I. Gevurtz & Sons it advanced and loaned to I. Gevurtz & Sons $35,000.00 in actual cash, and it appears from the evidence that it lost 77 per cent of that loan. In addition it paid claims against the Multnomah Hotel aggregating some $20,000.00, and it lost 77 per cent of those advances. In other words it received $175,000.00 of assets and after deducting all dividends from the bankrupt estate of I. Gevurtz & Sons, paid over $218,000.00 in cash therefor. On the other hand, the defendant in error, having a claim against the Multnomah Hotel Co., Philip Gevurtz and I. Gevurtz & Sons, consisting of two notes for $6000.00, has received $2500.00 in cash from the Multnomah Hotel Co., and something more than two and a half years after it alleges plaintiff in error assumed its debt, undertakes to saddle this old responsibility off onto the plaintiff in

error by evidence which we respectfully insist demonstrates that it has no legal claim, and that its rights of a moral or equitable nature are "thinner than the memory of a forgotten dream." For all of which reasons it is urged that the judgment of the District Court should be reversed and one here entered dismissing the defendant in error's bill.

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